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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/689,199	10/20/2003	George P. Teitelbaum	VLINK.2CP2DV1	4421

20995 7590 05/04/2006

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EXAMINER
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SWIGER III, JAMES L

ART UNIT	PAPER NUMBER
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3733

DATE MAILED: 05/04/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

10/689,199

Applicant(s)

TEITELBAUM ET AL.

Examiner

James L. Swiger

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 15 March 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 21-52 is/are pending in the application.
- 4a) Of the above claim(s) 21-25, 36-52 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 26-35 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date 4/19/05; 12/23/04; 4/17/04; 10/20/03
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Election/Restrictions***

Claims 21-25 and 36-52 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on 3/15/2006.

### ***Double Patenting***

Claim 26 is rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 1 of U.S. Patent No. 6,749,614. Although the conflicting claims are not identical, they are not patentably distinct from each other because both contain a first and second support structure, a cross bar, and wherein the structures are considered subcutaneous, and wherein the cross bar contains media that is hardenable.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) and the Intellectual Property and High Technology Technical

Amendments Act of 2002 do not apply when the reference is a U.S. patent resulting directly or indirectly from an international application filed before November 29, 2000. Therefore, the prior art date of the reference is determined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

Claims 26-27, and 30-31 are rejected under 35 U.S.C. 102(e) as being anticipated by Stalcup et al. (US 6,336,930). Stalcup et al. disclose an orthopedic construct as a plate that has a first and second support structure (see two vertical portion of Fig. 1), both of which are configured for attachment to the spine, a crossbar (proximate to the tube 30), and wherein the cross bar is capable of attachment subcutaneously, and wherein also the cross bar comprises a media that is hardenable while the support structure is positioned within the body of the patient (Col. 3, lines 24-37). Note that the disclose states that the hardenable material is in a bag. However, the "bag" is part of the bar structure and is considered part of the bar in relation to claim 26. The first support structure also may be considered to have hardenable material, since the polymer bag extends to this part of the structure (see Fig. 2). Stalcup et al. further disclose a first and second aperture (22) capable of attachment to the bone and a first and second bone anchor (28).

#### ***Claim Rejections - 35 USC § 103***

Claims 28-29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Stalcup et al. '930 in view of Gelbard. Stalcup et al. disclose the claimed invention except for cross ties to connect the first and second support to the cross bar. Gelbard discloses a cross-link fastening system (see Fig. 4) that allows operative association

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with the attachment screws by means of a top mounted link that is receptive to the protruding members. It would have been obvious to one having ordinary skill in the art at the time the invention was made to construct the device of Stalcup et al. having at least a cross tie system in view of Gelbard to better secure the screws and plate in use.

Claims 33-34 rejected under 35 U.S.C. 103(a) as being unpatentable over Stalcup et al. '930 in view of Boyce et al. (US 5,899,939). Stalcup et al. disclose the claimed invention except for specific use of epoxies and polyurethane in the hardenable mixture. Boyce et al. disclose a bone-derived implant that would be capable of interfacing from a material standpoint with a spinal structure on bone. Boyce et al. disclose that epoxy-based compounds are used (Col. 4, line 5) and polyurethane-based compounds are used (Col. 4, line 33) that allow for proper bone-derived materials to be properly bioabsorbable (Col. 4). It would have been obvious to one having ordinary skill in the art the time the invention was made to construct the device of Stalcup et al. having epoxy and polyurethane based ingredients in the hardening material in view of Boyce et al. to make the material more bioabsorbable.

Claim 32 is rejected under 35 U.S.C. 103(a) as being unpatentable over Stalcup et al. '930 in view of Fournet-Fayard et al. (US 5,486,174). Stalcup et al. disclose the claimed invention except for a bone anchor with an aperture allowing the support structure to extend through it. Fournet-Fayard et al. disclose a bone anchor with a hole (Fig. 3) allowing a spinal support structure through. This modification is used as an improved guidance means to keep the two portions together (Col. 2, lines 32-67). It would have been obvious to one having ordinary skill in the art at the time the invention

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was made to construct the device of Stalcup et al. having at least a screw with an aperture in the head in view of Fournet-Fayard et al. to better secure the interface between the two supports and cross bar.

Claim 35 rejected under 35 U.S.C. 103(a) as being unpatentable over Stalcup et al. '930 in view of Tormala et al (US 5,084,051). Stalcup et al. disclose the claimed invention except for reinforcing fibers around the cavity created within the plate bag (34). Tormala et al. disclose fibers that enable a strengthening of the bioceramic or hardening component (Col. 4, lines 19-42). It would have been obvious to one having ordinary skill in the art at the time the invention was made to construct the device of Stalcup et al. having at least fibers within the cavity of the cross bar for reinforcement in view of Tormala et al. to better strengthen the spinal device.

### ***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. See PTO-892.


Any inquiry concerning this communication or earlier communications from the examiner should be directed to James L. Swiger whose telephone number is 571-272-5557. The examiner can normally be reached on Monday through Friday, 8:30am to 5pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on 571-272-4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

JLS

 5/1/06

  
EDUARDO C. ROBERT  
SUPERVISORY PATENT EXAMINER